

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

FILED

at 3 O'clock & 20 min. P.M.
Date 10/3/94

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia JB

In the matter of:

BENJAMIN R. FOSTER

SS# 267-63-6904

Debtor

Chapter 13 Case

Number 88-41321

ORDER ON DEBTOR'S MOTION FOR HARDSHIP DISCHARGE

Debtor's case was filed November 29, 1988, and her Chapter 13 plan was confirmed by Order dated July 19, 1989, proposing to pay 100% of unsecured claims as filed. On May 23, 1994, the Chapter 13 Trustee moved to dismiss the case due to Debtor's default in making regular monthly payments to the plan. In response, the Debtor filed a Motion seeking a hardship discharge on June 20, 1994, and the case was heard July 27.

Debtor has not made a payment to the Chapter 13 Trustee since December, 1993, and a balance of \$2,539.00 remains to be paid into the case in order to fulfill the terms as originally contemplated. By way of explanation, Debtor's evidence revealed that he was gainfully employed at the time of confirmation, but,

because of medical reasons of a very serious nature, was unable to continue working. Debtor's evidence further revealed that he has sought recovery of Social Security benefits based on total disability which were administratively denied, but that a hearing had been requested to review that denial.

Because the receipt of Social Security benefits or other income rather than earnings from gainful employment would still enable to Debtor to fulfill the terms of his plan, and because Debtor's counsel was unfamiliar with the current status of the Social Security case, I left the record open for Debtor's Social Security counsel to advise the Court of the status and prognosis of his Social Security claim. On August 1, 1994, Debtor's Social Security counsel addressed a letter to the Court which revealed that counsel anticipates that the disability claim will ultimately be approved, but the hearing has not been held. The letter went on to state, however, that any award of Social Security benefits would not increase the Debtor's income because "Mr. Foster will likely have to reimburse the private long-term disability insurer for benefits that he has received and will have his prospective private long-term disability benefits offset on a dollar-for-dollar basis by the amount of Social Security disability insurance benefits which he receives."

Based on this information, it appears to the court that Debtor has been

receiving disability benefits through private insurance since the end of 1993. Thus, while Debtor may have suffered a reduction in income as a result of this unfortunate change in his health, the implication raised from the evidence at the hearing that the Debtor is without any income pending a resolution of the Social Security claim is apparently incorrect. Clearly the Debtor continues to have regular income, albeit from insurance or in the future from the Social Security Administration, and as a result, it was incumbent upon him to seek a modification of his plan based upon his change in income rather than a hardship discharge. *See* 11 U.S.C. § 1328(b)(3).¹ "[M]odification of the plan is thus a solution to the debtor's problems which is preferred by the Code. It should be attempted whenever it is feasible for the debtor, who could thereby preserve the normal Chapter 13 discharge. The Debtor's failure to establish the impracticality of modification is, standing alone, fatal to the motion." In re White, 126 B.R. 542, 545 (Bankr. S.D.Ga. 1991) (*quoting in part* 5 Collier on Bankruptcy, ¶

¹ 11 U.S.C. § 1328(b) provides:

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
- (3) modification of the plan under section 1329 of this title is not practicable.

1328.01[2][b][ii] at 1328-17 (15th ed. 1991)). Accordingly, the Debtor's Motion is denied and the Trustee's Motion to Dismiss the case is granted.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 30th day of September, 1994.